S Constantine v Social Security Organization (SOCSO) & Anor

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COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-151 OF 1995
NH CHAN JCA, KC VOHRAH AND MOHD NOOR AHMAD JJ
31 OCTOBER 1997

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Labour Law *— Social security — Entitlement to invalidity pension — Employee boarded out on medical reason — Medical board appointed by employer found that employee's injury permanent and not able to carry out duty as senior clerical officer — Whether sufficient to qualify employee as suffering from invalidity — Whether employee entitled to receive disability benefits — Employees Social Security Act 1969 ss 16 & 17*

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The appellant brought separate actions against each of the respondents in the same writ of summons. The appellant's claim against the first respondent ('SOCSO') was for a declaration that he was entitled to receive invalidity pension under s 17 of the Employees Social Security Act 1969 ('the Act'). The appellant contended that based on the findings on 18 September 1985 made by a Medical Board appointed by the employer ('MB 1'), he was to be considered as suffering from invalidity as defined in s 16 of the Act, thus entitling him to receive invalidity pension under s 17 of the Act. The Medical Board appointed by SOCSO ('MB 2') found that the appellant could work as a clerical person in any other company in a similar situation and as such he did not qualify for invalidity pension. The appellant contended that the findings of MB 1 should prevail. The appellant's claim against the second respondent ('the employer') was for damages or reinstatement for wrongful dismissal. However, there was no pleading for an action for wrongful dismissal and no other evidence was adduced by the appellant to challenge the findings of MB 1. The High Court dismissed the appellant's action (see [1995] 1 MLJ 81) . The appellant appealed.

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Held, dismissing the appeal:

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(1) All that MB 1 found was that the appellant's injury was permanent and that caused him to be unable to carry out his duty as a senior clerical officer and that he be recommended to be medically boarded out. This was not sufficient to qualify the appellant as suffering from invalidity. By virtue of s 16 of the Act, it was not enough to show that he was suffering from an incurable illness; he must also be incapable of engaging in any substantial gainful activity. This was not considered by MB 1. Therefore, the findings on 18 January 1985 of MB 1 was not a decision which could have come within the definition of s 16 of the Act. The declaration sought by the appellant against SOCSO was preposterous and absurd and thus the appeal was dismissed (see pp 164F–I and 165A–H).

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(2) There was absolutely no merit in the appellant's appeal against the dismissal of his action against the second respondent. Not only was the cause of action not pleaded, there was also no

A evidence to support a claim for wrongful dismissal. The judge was right in dismissing the action (see p 166E).

Per curiam:

The appellant had joined the two respondents together in the same B action as defendants without obtaining the leave of the court. Under O 15 r 4(1) of the Rules of the High Court 1980, leave of the High Court is required if there is no common question of law or fact involved in the two actions (r 4(1)(a)) and the rights to the relief claimed in the statement of claim against each of the respondents are not concerned with the same transaction or series of transactions C (r 4(1)(b)). Here, the appellant's claim against SOCSO and against his employer were quite unrelated to each other with no common question of law or fact involved. The person concerned in settling the statement of claim in this case ought to be more professional in future (see p 163D–G).

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[Bahasa Malaysia summary

Perayu membawa tindakan berasingan terhadap setiap penentang dalam writ saman yang sama. Tuntutan perayu terhadap penentang pertama ('SOCSO') adalah untuk suatu perisytiharan bahawa dia berhak menerima pencen ilat di bawah s 17 Akta Keselamatan Sosial E Pekerja 1969 ('Akta tersebut'). Perayu berhujah bahawa berdasarkan keputusan pada 18 September 1985 yang dibuat oleh sebuah Lembaga Perubatan yang dilantik oleh majikan ('MB 1'), dia haruslah dianggap hilang keupayaan seperti yang ditakrifkan di bawah s 16 Akta tersebut, justeru itu membolehkannya menerima pencen ilat di bawah s 17 F Akta tersebut. Lembaga Perubatan yang dilantik oleh SOCSO ('MB 2') mendapati bahawa perayu boleh bekerja sebagai kerani di mana-mana syarikat dalam keadaan yang serupa dan oleh itu tidak layak menerima pencen ilat. Perayu menghujahkan bahawa keputusan MB 1 haruslah diikut. Tuntutan perayu terhadap penentang kedua ('majikan') adalah untuk ganti rugi atau pengembalian kedudukan G jawatan untuk pemecatan salah. Walau bagaimanapun, tiada pliding untuk suatu tindakan pemecatan salah dan tiada keterangan lain dikemukakan oleh perayu untuk mencabar keputusan MB 1. Mahkamah Tinggi menolak tindakan perayu (lihat [1995] 1 MLJ 81). Perayu membuat rayuan.

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Diputuskan, menolak rayuan:

(1) Apa yang didapati oleh MB 1 hanyalah bahawa kecederaan perayu adalah tetap dan itu menyebabkannya tidak berupaya menjalankan tugas sebagai kerani kanan dan bahawa dia disyorkan supaya dibenarkan keluar atas alasan perubatan. Ini tidak I mencukupi bagi menjadikan perayu layak sebagai hilang upaya. Disebabkan s 16 Akta tersebut, ia tidak mencukupi bagi menunjukkan bahawa dia menghidapi penyakit yang tidak boleh diubati; dia juga mestilah tidak berupaya menceburi apa-apa

kegiatan yang menguntungkan. Ini tidak dipertimbangkan oleh MB 1. Maka, keputusan pada 18 Januari 1985 oleh MB 1 bukanlah keputusan yang boleh diliputi oleh tafsiran s 16 Akta tersebut. Perisytiharan yang dipohon oleh perayu terhadap SOCSO adalah tidak munasabah dan tidak masuk akal dan justeru itu rayuan ditolak (lihat ms 164F–I dan 165A–H).

(2) Tiada sebarang merit dalam rayuan perayu terhadap penolakan tindakannya terhadap penentang kedua. Kausa tindakan bukan sahaja tidak dihujahkan, juga tidak terdapat keterangan bagi menyokong tuntutan untuk pemecatan salah. Hakim adalah betul dalam menolak tindakan (lihat ms 166E).

Per curiam:

Perayu telah mencantumkan kedua-dua penentang bersama dalam tindakan yang sama sebagai defendan-defendan tanpa memperolehi kebenaran mahkamah. Di bawah A 15 k 4(1) Kaedah-Kaedah Mahkamah Tinggi 1980, kebenaran Mahkamah Tinggi diperlukan sekiranya tiada soalan undang-undang atau fakta terbuka yang terlibat dalam kedua-dua tindakan (k 4(1)(a)) dan hak mendapatkan relief yang dituntut dalam pernyataan tuntutan terhadap setiap penentang tiada kena-mengena dengan transaksi atau siri transaksi yang sama (k 4(1)(b)). Di sini, tuntutan perayu terhadap SOCSO dan terhadap majikannya tidak berkaitan antara satu sama lain tanpa melibatkan apa-apa soalan undang-undang atau fakta terbuka. Orang yang menyelesaikan pernyataan tuntutan yang berkenaan dalam kes ini haruslah bersikap lebih profesional pada masa depan (lihat ms 163D–G).]

Legislation referred to

Employees' Social Security Act 1969 ss 15, 16, 17
Rules of the High Court 1980 O 15 r 4(1), 4(1)(a), (b)

Appeal from: Suit No 22–220–1992 (High Court, Shah Alam)

Shahrul Hameed Amirudin (*Gomez & Associates*) for the appellant.
Jayanthi Pillay and *Zahrin Ishak* (*Kadir Tan & Ramli*) for the first respondent.
Azlan Sulaiman (*Abdullah & Zainudin*) for the second respondent.

Cur Adv Vult

NH Chan JCA (delivering the judgment of the court): The appellant has brought separate actions against each of the respondents, namely, the Social Security Organization ('SOCSO') and Lembaga Pelabuhan Klang in the same writ of summons. In his statement of claim, he claims:

(a) against the first defendant
  (i) for a declaration that by virtue of the Medical Board decision on 18 September 1985 obtained by the second defendant that the plaintiff is suffering from invalidity which is deemed to be of

permanent nature, incurable and is not likely to be cured and in reliance of which the second defendant terminated the plaintiff's services is within the meaning of the provisions under s 16 of the Employees' Social Security Act 1969 entitling the plaintiff to receive invalidity pension pursuant to s 17 of the Social Security Act 1969; and

(ii) for a determination that the first defendant is bound by the findings of the Medical Board convened by the second defendant on 18 September 1985.

(b) Alternatively, against the second defendant

(i) for an order that the second defendant do pay to the plaintiff the sum of RM51,768.75; and

(ii) alternatively, for a declaration that the termination of the plaintiff by the second defendant on medical grounds is null and void and of no effect and that the plaintiff is still a senior clerical officer of the second defendant entitled to all wages benefits and seniority, effective from 30 October 1985.

As can be seen, the appellant has joined the two respondents together in the same action as defendants without obtaining the leave of the court. Under O 15 r 4(1) of the Rules of the High Court 1980, leave of the High Court is required if there is no common question of law or fact involved in the two actions (r 4(1)(a)) and the rights to the relief claimed in the statement of claim against each of the respondents are not concerned with the same transaction or series of transactions (r 4(1)(b)). Here, the appellant's claim against SOCSO is for a declaration that he is entitled to receive invalidity pension under s 17 of the Employees' Social Security Act 1969 ('the Act'), whereas, in his claim against his employer, the second respondent, it is for damages or reinstatement for wrongful dismissal. Both these claims are quite unrelated to each other with no common question of law or fact involved.

Suffice it to say our observations are made to remind whoever was concerned in settling the statement of claim in this case to be more professional in future.

Be that as it may, we shall now deal with the appeal proper.

The claim against SOCSO (the first respondent)

The relevant part of the claim against SOCSO in the appellant's statement of claim is as follows:

7 The plaintiff underwent four surgical operations for inguinal hernia once on the right side and thrice on the left side a recurrence of inguinal hernia (direct) weak lower abdominal wall musculative in 1970, 1972 at General Hospital, Kuala Lumpur and at the General Hospital, Klang in January 1984 and August 1984. Full particulars of which the second defendant is fully aware.

15 On 18 September 1985, pursuant to the instructions of the second defendant, the plaintiff attended the Medical Board held at the Hospital Besar Tengku Ampuan Rahimah, Klang which decided that the plaintiff be medically boarded out.

16 By a letter dated 28 October 1985, the second defendant terminated the plaintiff's services effective from 12 midnight on 30 October 1985 on medical grounds as the Medical Board had recommended that the plaintiff's injury:
(a) is deemed to be of permanent nature;
(b) is incapable of carrying out the duties of a senior clerical officer; and
(c) had resulted in the plaintiff being unwell permanently.

17 On 31 October 1985, the plaintiff filed an application for an invalidity pension at the first defendant's office in Klang.

18 Notwithstanding the fact that a duly convened Medical Board has determined the disability of the plaintiff, the plaintiff was referred to another Medical Board convened by the first defendant at the same Hospital on 31 January 1986.

25 By a letter dated 8 January 1988, the first defendant informed the plaintiff of the decision of the Appellate Medical Board held on 16 December 1987 in Forms PKS 13/(ILAT), upholding the decision of the first defendant's Medical Board held on 31 January 1986.

27 The plaintiff contends and will contend that both the defendants being statutory bodies, ought to have been satisfied with the findings of one Medical Board and in any event, in view of the plaintiff having suffered loss and damages, the first defendant was estopped in law and in fact from referring the plaintiff to any further Medical Board.

And the appellant asks for a declaration to say that based on the findings on 18 September 1985 made by a Medical Board his employer had appointed, he is to be considered as sufferring from invalidity as defined in s 16 of the Act, thus, entitling him to receive invalidity pension under s 17 of the Act.

The Medical Board appointed by the second respondent found on 18 September 1985 that the appellant is suffering from:

> Recurrence of inguinal hernia (direct) with weak lower abdominal wall musoulative. Patient is reluctant to have surgery in view of the past failure ...

and that:

(a) the injury is permanent; and
(b) this causes him not being able to carry out his duty as a senior clerical officer, and that the patient be recommended to be medically boarded out.

That is all that this Medical Board found. But that is not sufficient to qualify the appellant as suffering from invalidity. It is not enough to show that he is suffering from an incurable illness, he must also be incapable of engaging in any substantial gainful activity. See s 16 of the Act which reads:

16 (1) An insured person shall be considered as suffering from invalidity, if, by reason of a specific morbid condition of permanent nature, he is incapable of engaging in any substantially gainful activity.

(2) For the purposes of subsection (1) —

A (a) a morbid condition shall be deemed to be of permanent nature if it is either incurable or is not likely to be cured;

(b) a person shall be deemed to be incapable of engaging in a substantially gainful activity, if in consequence of the specific morbid condition of sickness or infirmity, he is no longer capable of earning, by work corresponding to his strength and B physical ability which, in view of his training and former occupation, might reasonably be assigned to him at the place of his employment or at a similar place in the neighbourhood or in the same district, one-third of the customary earnings of a mentally and physically sound person with similar qualifications and training; ... .

C Therefore, the findings on 18 January 1985 of the Medical Board appointed by the second respondent was not a decision which could have come within the definition of s 16 of the Act. As to why this Medical Board never considered the effect of s 16 of the Act, it is because this Medical Board was appointed by the employer of the appellant and not by SOCSO. Had D the Medical Board been appointed by SOCSO under s 15 of the Act, the approach would have been different as the SOCSO appointed board will then have to consider whether the condition and situation of the appellant would come within the meaning of s 16. In fact, the Medical Board appointed by SOCSO did consider the effect of s 16. DW1, Dr Peters, who sat on the SOCSO Medical Board, put it, thus:

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> ... whether the patient has disability that is permanent which incapacitated him to a degree that he will require medical attention, and secondly whether if he is capable of being employed in gainful activity, the income he would derive is less than ⅓ he was drawing at that time ...

F and the SOCSO Board then found, as follows:

> ... we find that the plaintiff can work as a clerical person in any other company in a similar situation. As such, he does not qualify for invalidity pension [under the SOCSO Act].

It is because the Medical Board appointed by SOCSO had found against G the appellant that he now insists that the findings of the Medical Board appointed by his employer should prevail.

For the reasons which we have just stated, we find that the proposition in the declaration sought by the appellant against SOCSO to be preposterous and absurd. The action against SOCSO was misconceived and we dismissed H the appeal.

On the question of judicial review and whether the action was an action for judicial review, we do not wish to say anything as the matter was not canvassed before us.

The claim against the appellant's employer (the second respondent)

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Apart from stating that he had been medically boarded out in paras 15 and 16 of his statement of claim, there is no pleading for an action for wrongful dismissal. We reproduce below these two paragraphs from the statement of claim:

15 On 18 September 1985, pursuant to the instruction of the second defendant, the plaintiff attended the Medical Board held at the Hospital Besar Tengku Ampuan Rahimah, Klang which decided that the plaintiff be medically boarded out.

16 By a letter dated 28 October 1985, the second defendant terminated the plaintiff's services effective from 12 midnight on 30 October 1985 on medical grounds as the Medical Board had recommended that the plaintiff's injury:
(a) is deemed to be of permanent nature;
(b) is incapable of carrying out the duties of a senior clerical officer; and
(c) had resulted in the plaintiff being unwell permanently.

The judge below had found that there was no other evidence adduced by the plaintiff to challenge the findings of the Medical Board appointed by the second respondent and he went on to say:

> In fact, the plaintiff has accepted its findings and had not complained or protested to the second defendant for being medically boarded out. He had accepted from the second defendant all the gratuity and benefits due to him. It was only after more than 2½ years later, that when the plaintiff failed to secure invalidity pension from the first defendant that he conjured this allegation against the second defendant.

There is absolutely no merit in the appellant's appeal against the dismissal of his action against the second respondent. Not only was the cause of action not pleaded, there was also no evidence to support a claim for wrongful dismissal. The judge was right in dismissing the action. We dismissed this appeal.

Appeal dismissed.

Reported by Jafisah Jaafar